

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

VIVINT, INC.

Employer

and

Case 04-RC-235166

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 827

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

A major factor in determining the appropriateness of a petitioned-for bargaining unit is whether it tracks the administrative or operational boundaries drawn by an employer. See *Bergdorf Goodman*, 361 NLRB 50, 52 (2014); *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). The Employer in this case, Vivint, Inc.¹ (Employer), installs and services smart home security devices. International Brotherhood of Electrical Workers Local 827 (Petitioner) seeks to represent all so-called South Jersey field service professionals employed by Vivint, Inc. (Employer) who are assigned to a single supervisor, Field Service Manager Elvis Moncada. The record demonstrates, however, that the work of the petitioned-for employees is not centered in the South Jersey area, but rather is concentrated in the greater Philadelphia area. There are, in addition, 14 additional field service professionals who service a similar geographical area, and who are only distinguished from the petitioned-for field service professionals by the fact that they are directly overseen by a different supervisor, Field Service Manager Stephen Pham.

After carefully reviewing the evidence and balancing the traditional community-of-interest factors as set forth in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), I find, as contended by the Employer, that the petitioned-for unit is not appropriate because the petitioned-for employees share overlapping geographical service areas, the same job functions, skills, training, and terms and conditions of employment, and have significant functional integration, interchange and contact with the 14 field service professionals that the Employer seeks to include.

¹ The Employer's correct legal name is Vivint, Inc., but the record establishes that it does business as Vivint Smart Home.

A Hearing Officer of the Board held a hearing on February 13, 2019. Both parties filed briefs on February 20, 2019. Based on the record, I find that the petitioned-for unit is not appropriate because the employees in that requested unit do not possess a community of interest meaningfully separate and distinct from the employees that the Petitioner seeks to exclude. As the Petitioner does not wish to proceed to an election in any unit other than the unit proposed in its petition, the petition is dismissed.

I. OVERVIEW OF OPERATIONS

The Employer is a Delaware corporation with headquarters in Provo, Utah. As a smart home technology provider, the Employer sells, installs and services smart home security devices in the United States and Canada, including security panels, security sensors, thermostats, and indoor/outdoor cameras.

The Employer employs roughly 3,000 field service professionals across the United States in its Field Operations Division. The field service professionals (FSPs) travel to customers to install smart home security technology and service existing customers. The Field Operations Division has two sections of field service supporting two different sales operations: direct-to-home (DTH) sales; and Inside Sales. The parties stipulated that the field service supporting the DTH sales, which is seasonal, is not at issue here.

The Inside Sales is a largely digitally driven sales process where customers contact a call center to purchase products and services. The Field Service operation, which is headed by a Vice President, is split into four zones—East, Central, West, and Canada—each with its own director. Under each director are regional managers, and then field service managers (FSMs). There are 15 or 16 regional managers and nearly 100 FSMs. FSMs manage a small team of FSPs also called pros or technicians. Each FSM has on average between 11 and 13 FSPs. FSPs are based out of their homes. The Employer regularly ships the necessary equipment directly to the FSPs' homes from the Employer's distribution center in Utah.

All FSPs use the same tools—an iPad, iPhone, drill, vacuum, hand held tools, and PPE safety equipment—to do the same work. All FSPs have Tech Genie, a proprietary application, on their iPhones and iPads, which they use to view their schedule and assignments, track completion of their assignments, see what inventory they need, contact their manager, and transfer inventory. All FSPs wear the same Employer-issued uniform. They are also provided with the same vehicles and a gas/maintenance card, and receive the same Employer benefits, including a 401(k), health, dental and vision benefits, holidays, and paid time off. Wage rates vary depending on the market and are set by recruiters. All FSPs clock in and out each day using Workday, a website. They also request time off through Workday, which their FSM approves.

The Employer schedules FSPs through a software system called Click, which is used to optimize how FSPs are sent to appointments for installation and service. Once FSPs are hired, they are set up into Click by using their home addresses. Depending on the area they live in, the Employer specifies a certain working radius from their homes. In addition, the Employer specifies in Click which working districts, geographical divisions set throughout its zones, any individual FSP is permitted to work. In some circumstances, FSPs may have multiple working districts that

they can work in and other cases they may only have one, depending on how the Employer wants to control the work they are doing. The working districts are evaluated annually and may be changed based on the amount of work in an area. FSPs can be booked anywhere in their work radius except where that radius touches a working district that they do not have permission to work. Sometimes a customer's home is not covered by any FSP. To reach those customers who would not otherwise be covered, the Employer will temporarily move the home location of a FSP to be able to send the FSP to a remote location which is not covered by any other FSP.

While all FSPs can service as well as install equipment, the Employer designates some FSPs in Click as “Legacy” or “Install Only.” FSPs designated as “Legacy” have had training or experience to service legacy equipment—older versions of the Employer’s equipment. They may also have experience in integrating customers’ older hardwired systems with the Employer’s equipment. Click also designates one FSP on each team as a Trainer. Trainers do onsite training with new hires in the customers’ homes. They are assigned less time on the working schedule so they have adequate time to be out in the field with new hires. Typically, new hires do roughly four weeks of field training.

Customer care representatives at the Employer’s call center in Utah use Salesforce, a software interface with Click, to schedule installations and service. Click pulls up all the FSPs that could potentially service the customer and examines their available times using work radius, working districts, and, if necessary, legacy experience. Click tentatively books the most optimized FSP for the job based on which FSP has the shortest amount of driving distance to the job. Every three hours, Click reoptimizes the jobs. If another job nearby is cancelled or another technician gets a job that is closer, Click will change the FSP assigned to the job. A job may be switched between FSPs on various teams multiple times until it is finally locked to a particular FSP three hours before the appointment time.

II. THE RELEVANT LEGAL AUTHORITY

The Act requires that a petitioner seek representation of employees in *an* appropriate unit, not the most appropriate unit possible. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g., *R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), *enfd.* 411 F.2d 356 (7th Cir. 1969).

Recently, in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), the Board rejected the overwhelming community of interest standard created in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *affd.* sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and reinstated the traditional community-of-interest standard for assessing the appropriateness of a petitioned-for unit when the employer argues that the unit improperly excludes certain employees. Thus, once the Board determines that the employees in the unit sought by a petitioner share a community of interest, it next evaluates whether the interests of that group are “*sufficiently distinct* from those of other [excluded]

employees to warrant the establishment of a separate unit." *PCC Structural*s, supra, slip op. at 7, quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn. 2 (2010) (emphasis in original).

Specifically, the inquiry is whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *PCC Structural*s, supra, slip op. at 11, quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis in original). In making this assessment, the Board examines whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id.*, slip op. at 11 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). All relevant factors must be weighed in determining community of interest.

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion; whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. *See, e.g., Overnite Trans. Co.*, 322 NLRB 347 (1996). With respect to employee interchange, the Board looks to see if there is significant, widespread interchange among employees for a proposed unit "suggest[ing] blurred departmental lines and a truly fluid work force with roughly comparable skills." *See Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). The Board has held that the lack of significant interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resources Assoc.*, 301 NLRB 400, 401 (1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)). A relevant factor also is the amount of work-related contact among employees. *See, e.g., Casino Aztar*, 349 NLRB 603 (2007).

III. FACTS

A. *Same Job Duties and Skills in a Similar Geographical Area*

Petitioner seeks to represent the 13 FSPs who are assigned to work under FSM Elvis Moncada.² Although the Petitioner argues that the petitioned-for FSPs are based in a separate geographical region known as the South Jersey region, the record demonstrates to the contrary that these employees work primarily in the Philadelphia, PA working district in essentially the same overlapping geographical area as the employees working under FSM Stephen Pham. All but two FSPs³ on the Moncada team share the same Philadelphia working

² Moncada recently became the FSM over this team in early January 2019. Prior to this time, the Employer rotated four FSMs to cover this team after the Employer terminated the permanent FSM of the team in November 2018.

³ Only FSPs Richard Rivera and Jeffrye Arroyo, who are both on Moncada's team, are not designated under the Philadelphia working district. Rivera is assigned in the Atlantic City,

district with all FSPs on Pham's team.⁴ Both teams have some employees working also in the following working districts: Atlantic City, NJ, Newark, NJ, and Dover, DE. Although five FSPs on Pham's team have a working radius of over 65 miles, the majority of FSPs on both teams have the same working radius of roughly 35-45 miles from their homes. Moncada team members Shawn Sabb and Andrew Romano testified that they work 50 percent of their time in New Jersey and 50 percent of their time in Philadelphia. While individuals may informally refer to the Moncada team as the South Jersey team, the substantial weight of the record evidence establishes that both teams work predominantly in the greater Philadelphia area.

Team designation and working districts appear to change according to customer demand. Prior to 2016, a single manager oversaw a combined Philadelphia and New Jersey working district. Because customer demand increased, the Employer created additional teams to cover these areas.

None of the FSPs at issue report to a particular facility, but rather they are dispatched from their homes to customer locations. Both teams perform the same duties as FSPs elsewhere, installing smart home security technology in customers' homes and servicing existing customers. FSPs on both teams have on average two to six assignments per day. Inventory is delivered to their homes. As they perform the same work, the FSPs in both teams have similar skills, including technical field service and customer service skills.

FSPs on both teams perform installation and service to the same customers. The Employer's scheduling software will switch assignments between FSPs on both teams as it tries to optimize driving time for jobs. Moncada team member Sabb testified that about once a week he will typically work for a customer that a Pham team member previously had serviced.

B. Same Terms and Conditions of Employment and Training Procedures

FSPs on both teams share the same terms and conditions of employment. As discussed above, they wear the same uniforms, use the same vehicles and tools, including iPhones and iPads equipped with Tech Genie and Workday. All FSPs in both teams work four ten-hour days either Sunday through Wednesday or Wednesday through Saturday. Most FSPs work 8:00 a.m. to 6:00 p.m., with some occasional overtime. The Employer has also recently offered an alternative schedule of 10:00 a.m. to 8:00 p.m. as a pilot program. All FSPs on both teams clock in and out using the Workday app on the iPhone or iPad provided by the Employer.

The Employer evaluates FSPs on both teams using the same performance standards based on the results of customer surveys, quality scores and completion rates. FSPs in both teams are also paid based on pay rate scales determined by recruiters for the New Jersey-Philadelphia, PA market. An FSP hired into either Moncada's or Pham's team would be offered \$19 to \$22 per hour,

NJ working district and Arroyo works in the following working districts: Atlantic City, NJ; Dover, DE; and Newark, NJ.

⁴ In addition to Philadelphia, some employees on Pham's team are also assigned to one or more of the following working districts: Dingman, PA; Harrisburg, PA; Wilkes Barre, PA Binghamton, NY; and Elmira, NY.

depending on experience. FSPs on both teams also receive the same Employer benefits, including a 401(k), health, dental and vision benefits, holidays, and paid time off.

License requirements vary depending on the state. Pennsylvania has no licensing requirements, but both New York and Delaware require individual licenses. New Jersey has a qualifier license that allows employees to work in that state if one FSP has a license.

Newly hired FSPs on each team undergo roughly four weeks of the same field training by each team's designated trainer. They also do online academy training. Once they complete their four weeks of field training and academy training, FSPs conduct a final certification test at the Employer's headquarters in Utah.

C. Supervision

While the two teams do not have the same immediate supervision, overall supervision is the same. Jay Reser is the Director of the east zone covering the eastern part of the United States. Shawn Rose and Jesse Cropper are two of the Regional Managers who report to him. FSM Moncada reports to Rose while FSM Pham reports to Cropper.

Both Moncada and Pham conduct separate meetings with their respective teams. They both conduct weekly conference calls with their teams where they discuss any new policies, new equipment, or new processes. Each team also has separate quarterly meetings where they meet in person at restaurants or other locales. For instance, at his most recent quarterly meeting, Pham took his team axe throwing. Pham invites corporate partners to the quarterly meetings. Director Reser has made appearances at some quarterly meetings. The Employer sends identical "meeting decks" and PowerPoint presentations to the FSMs for their meetings. The FSMs will present company-wide Power Point presentations, but they may customize a few slides that pertain to their own teams such as their team's scores.

Although FSPs work primarily by themselves, FSPs contact their FSM when they have a scheduling issue or encounter problems completing a job. Moncada and Pham are also responsible for approving overtime or paid time off for their team members. Both Moncada and Pham work out of their homes and do not report to any particular facility.

Significantly, many supervisory functions are centrally administered in Utah. FSPs' assignments originate in the Click scheduling system, rather than by each team's FSM. Although the FSM may adjust work schedules, the FSM works with the centrally located scheduling department to make any scheduling modifications. For disciplinary matters, the FSMs contact their regional managers, and then submit a disciplinary write-up to the centralized human resources department located in Provo, Utah. The human resources department then reviews the discipline recommendation and will either approve, revise, or deny the disciplinary action. Once the discipline has been approved, the FSM will discuss the discipline with the employee. Terminations are done in person by the designated FSM, but sometimes another team's FSM is also present. For a recent termination conducted by Moncada, Pham was also present and he helped in collecting the vehicle and tools from the employee.

The Workforce Planning team, located in Provo, in consultation with regional managers is responsible for deciding whether to hire new FSPs, and specifically where to hire new FSMs. FSMs then are responsible for interviewing candidates for their own teams and deciding which candidates to hire. Occasionally, FSMs attend another FSM's interview to give their feedback.

D. Functional Integration, Interchange and Contact

There exists a high degree of functional integration between the two teams, as well as contact and interchange. As described above, the Employer schedules FSPs through Click, which constantly optimizes which FSP has the shortest amount of driving time to an installation or service assignment. On a monthly basis, Click will switch assignments over 600 times between FSPs on both teams. Pham testified that while Click optimizes the schedule, there may be situations when it will not detect problems such as gaps in the schedule or delays. In those situations, using Click, both FSMs will look at either team to see if assignments can be switched to balance the schedules. If a FSM believes an assignment should be switched, the FSM will contact the scheduling department to change the assignment.

There is also frequent contact between the two teams as they cover a similar geographical area. FSPs from each team will contact each other to transfer inventory using Tech Genie. When FSPs sometimes run out of stock or equipment, the FSPs will text other FSPs from their own team or another team in the area to acquire needed supplies. According to FSP Sabb, he first tries to acquire equipment from his own team and if he is not successful, then he tries obtaining it from Pham's team. Over the past six months, FSPs from one team met with FSPs from the other team between seven and 16 times per month to transfer inventory. FSPs do not need permission from their FSM to transfer inventory to another FSP. Pham testified that because FSPs often do not have enough equipment, he orders equipment for himself that he can then transfer to FSPs on both teams as needed. Although most of the time FSPs work alone, there are some instances where the Employer will have a large installation and two or more FSPs will work together regardless of whether they are from the same team. FSPs will sometimes work alongside other FSPs if someone needs help. Moncada team member Sabb testified that he worked with Pham team member Mike Bowers twice in the past two years. In addition, although it is not common practice, there have been instances where trainers from one team have trained new hires from the other team.

There is ample evidence of permanent interchange between the two teams. The Employer moves FSPs from one team to the other team based on headcount. If a FSP on one team is terminated and the other team is larger, the Employer will move the FSP to balance out the numbers. FSPs Richard Arjona and Sean Boston have transferred back and forth between the two teams multiple times. FSPs may also be moved from one team to another when working districts are realigned. Currently, six of the 13 FSPs on Moncada's team started on Pham's team. The Employer has also transferred FSPs on Pham's teams to other FSM teams.

IV. ANALYSIS & CONCLUSIONS

Based on the foregoing, I conclude that the petitioned-for unit is not appropriate, as the petitioned-for FSPs supervised by Moncada do not have meaningfully distinct interests in the context of collective bargaining that outweigh their similarities with the FSPs supervised by Pham. *PCC Structural*s, supra, slip op. at 11, quoting *Constellation Brands, US. Operations, Inc. v. NLRB*, supra. See also *Colorado National Bank of Denver*, 204 NLRB 243 (1973). The petitioned-for unit has one community of interest factor— immediate supervision—that is not also shared with the FSPs supervised by Pham. Although separate supervision sometimes weighs in favor of finding a separate unit, it does not compel that result. See e.g. *Casino Aztar*, 349 NLRB 603, 607 (2007), citing *Hotel Services Group, Inc.*, 328 NLRB 116, 117 (1999) (separate supervision does not mandate separate units); *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999); *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998) (a community of interest was found based on functional integration even where employees' wages and benefits differed and they shared only secondary and overall supervision). Many of the supervisory and managerial functions, such as work assignments and discipline decisions, are centrally administered in Utah rather than by the individual FSM. FSPs on both teams share the same job functions, skills, training procedures, and terms and conditions of employment. There is frequent contact and frequent permanent interchange between the two teams as well. There is also a high degree of functional integration as assignments, inventory and equipment are often transferred between the two teams. Most importantly, most FSPs on both teams service the same customers in an overlapping geographical area. The petitioned-for unit is too narrowly drawn and fails to correspond to the Employer's operational boundaries. Contrary to the Petitioner's characterization of the unit, there exists no official South Jersey Region. Rather, the record evidence establishes that most of the employees on both teams service the same greater Philadelphia area. Although the two groups do not share direct supervision, I find this factor is outweighed by all the other factors they have in common. See e.g. *Seaboard Marine*, above at 556.

Since I have found that the petitioned-for unit is not an appropriate unit, and the Petitioner has indicated that it does not wish to proceed to election in an alternative unit, the petition is dismissed.

V. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

VI. ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

VII. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations and must be filed by **Tuesday, March 19, 2019**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 5, 2019

/s/ Dennis P. Walsh

DENNIS P. WALSH

Regional Director, Region Four
National Labor Relations Board